No. 14770.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., a Corporation, PETER A. BANCROFT and VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S REPLY BRIEF.

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Appellees.

APPELLANT VINELAND'S REPLY BRIEF.

The only Appellee who has responded to Appellant Vineland's Opening Brief is International Airports, Inc., and therefore this Reply Brief will be confined to answering in the order set forth herein below the following arguments indicated in said Appellee's Brief.*

I. "The Documents Show a Plain Intent to Transfer Title." (I. A. 49);

II. "As a Bona Fide Purchaser (Encumbrancer, Accessor), International Is Entitled to Prior Rights in the Plane. International Is a Bona Fide Purchaser (Encumbrancer, Accessor)." (I. A. 58);

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*Page references to Appellee International Airports, Inc., Answering Brief shall be hereinafter designated as (I. A. .....).

III. "As Against International, Vineland Is Estopped to Deny That It Passed Title to the Finns." (I. A. 67);

IV. "International Has Prior Rights by Accession." (I. A. 77).

ARGUMENT.

I.

Right, Title and Interest to the Aircraft in Suit Did Not and Has Not Passed From Vineland to the Finns.

International argues that the Agreement [Vineland's Ex. "B"] shows a plain intent to transfer the title (I. A. 49-51). To substantiate this allegation International quotes paragraphs I and II of said Agreement, which paragraphs this Appellant, in its Opening Brief,** admitted appeared to transfer present title (V. 9). As pointed out in said Opening Brief, however (V. 8-9), said Agreement in paragraph 4 [R. 62] clearly indicates that the Agreement was *contingent* upon the contractors' ability to secure the necessary clearances of the Government, *notwithstanding* any other provisions in the Agreement.

Even though paragraphs appear in the subject Agreement indicating present transfer of title, the true Agreement between the District and the Finns, which must be determined as the lawful Agreement and the terms and conditions under which the parties are bound, is that which is made up by the Notice for Bids [Vineland's Ex. "A"] and the Bid as accepted. A notice for bids is an invitation by a public agency for offers. The bids, in compliance with such notices, are in the nature of irrevocable

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**Page references to Appellant Vineland's Opening Brief shall be hereinafter designated as (V. .....).

offers by the contractors. Upon acceptance of the contractor's bid, a contract comes into existence in accordance with the terms and conditions as set forth in the notice and bid as accepted (*Kemper Construction Company v. City of Los Angeles,* 37 Cal. 2d 696). Any formal agrement entered into after acceptance of such a bid must be read so as to carry out the intent as indicated in the notice for bids and the bid as accepted. Any clauses in the subsequent formal agreement, which are contrary or go beyond the notice for bids and the bid as accepted, would be illegal and void, and therefore must be ignored. (*Ryan v. Ashbridge,* 10 Pa. Dist., R. 153, 160, 161; *Miller v. McKinnon,* 20 Cal. 283.) In the instant case, there is clearly no indication in the notice for Bids or in the Bid as submitted by the Finns and accepted by the District which would indicate that the District intended to pass title, except subject to certain conditions precedent (the argument of Vineland is not based upon a "false assumption" as alleged by International (I. A. 52)), *i. e.,* the notice points out that the aircraft was acquired from the Government and the War Assets Administration, and that it was "subject to certain restrictions on the use thereof under the deed of conveyance," and that "the successful bidder will be *required to secure* the necessary releases to said restrictions from the proper governmental agency of the United States of America." Contrary to showing any intention to pass immediate title, said Notice makes it clear that the sale would be a conditional one. That the bidder "will be required" indicates a present intention that such "will be required" prior to any consummation of an unconditional sale. This intention of condition precedent is borne out by the subsequent formal agreement (as pointed

out above, said agreement must be interpreted so as to comply with the notice) in that said agreement is made *contingent* upon contractors' ability to obtain the subject releases, and this contingency is *notwithstanding* anything to the contrary on the agreement. Therefore, International's argument concerning the clear language of transfer of title through paragraphs I, II and III of the subject Agreement [Vineland's Ex. "B"] must fall. To construe the Agreement otherwise would be to rewrite the agreement for the parties and construe the Agreement so as *not* to give it legal effect; this would be clearly contrary to thoroughly recognized rules of construction.

International argues that it was not necessary for the Finns to obtain releases of restrictions which were not required by law (I. A. 51). There does not appear to be anything in the Notice for Bids [Vineland's Ex. "A"], nor in the subsequent Agreement, which indicates that the District intended that such restrictions, as appeared in the transfer documents from the Government, were not to be released by the Government whether they were legally enforceable or not. (If the District intended to waive any restrictions appearing in the transfer documents which could later be proved by the Finns, or anybody else, to be improper, this could have and would have been so provided.)

It matters not whether the District knew or cared that such restrictions were enforceable, valid or even proper. The restrictions were called to the attention of the bidders and it was made clear that releases were to be obtained. The District may well have been aware of the possible invalidity of the restrictions, but in a spirit of comity and cooperation with the Federal Government the district first demanded this release.

If the District desired only the narrow removal of restrictions as indicated by International, it would have provided for removal of the *legal and proper* restrictions, or some such other language. Instead, the District demanded "removal of the necessary releases to *said* restrictions." *Said* restrictions can only mean those which appear on the face of the transfer documents, not a determination by the bidder as to which ones are valid.

The Agreement also indicates an intended separation of requirements of removal in (1) the transfer documents and (2) the "related Federal laws," by providing:

> ". . . this agreement is contingent upon Contractors' ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the afore-described C-44 Aircraft #23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to the District, *and* by virtue of related Federal laws on the use thereof." [R. 62.]

The conjunctive "and" in said clause thus indicates (1) restrictions appearing on the face of the transfer documents, whether or not they exist in the law, *and* (2) restrictions appearing in related *laws*. By International's own argument (I. A. 51), the words "by virtue of" are intended to mean "in," thus the restrictions "in" the transfer documents is intended to mean those appearing on its face, regardless and separate from any related laws.

Even adopting International's argument that the "sales receipt" [International's Ex. "A"] is the sale document to the District from the Government, clearly the District intended the Form 65 Agreement when in the "Notice for Bids" it called attention to restrictions on *uses* of the air-

craft. The District also indicates such intent in its Agreement by again referring to the restricted *uses;* it remained a burden upon a bidder to determine what those restrictions were and where they were to be found. The Finns certainly knew of the restrictions since one of them went to Washington in an attempt to obtain the releases. [R. 353-354.]

The word "necessary" before the word "releases" indicates that releases must be obtained which the District demanded as necessary or in the absence thereof, according to the contemporaneous construction of what releases were in *fact* as well as in law deemed necessary. The agency which set them forth and from whom the releases were to be obtained, *i. e.,* the Government would be the proper agency to make such a determination. Certainly, it was not meant that only those releases which the Finns determined in a quasi judicial manner to be necessary or as may be determined by future court action as necessary was intended. There would have been no purpose for the requirement if the bidders were to make such a determination, nor did the District bargain for the purpose of "buying a lawsuit."

Even assuming no violation of the release conditions, there was clearly no performance of other conditions *re* payment and performance. International indicates that Vineland received "part performance" (I. A. 55). International cites no case law nor does it pursue the point beyond mentioning the doctrine. The part performance doctrine is strictly construed and appears in California as an exception to the Statute of Frauds in transfers of real property only. The doctrine would appear to have no place in the subject case. Also, clearly here, where there has admittedly been *no* payment whatsoever of the cash

consideration, there can be no part performance. *Sole use* of the subject aircraft remains in the District until *all* of the terms and conditions of the Agreement are fully performed by Contractors [Par. II, R. 60]:

> "The Contractors hereby agree, and do hereby accept the possession and title of said C-46 Aircraft #23645, as evidenced by this agreement, and the aforesaid Bill of Sale and/or transfer of title; provided, however, the Contractors agree that irregardless of the transfer of possession and title of said C-46 Aircraft #23645, the *sole use* of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as *all* of the terms and conditions set forth in this agreement are fully performed by Contractors in a reasonable and competent manner; . . ."

This reservation of the *sole use* of the aircraft in the District certainly allows no "part performance." To the contrary, the reservation again indicates the clear intent to grant subject to a condition precedent, or at least only an equitable title under a conditional sales contract. International has received no greater title in the aircraft than the Finns have obtained, and thus any judgment granting any rights to possession, use or title to the Finns or International in the subject aircraft must be found subject to Vineland's prior title and right to use of the subject aircraft.

The *actions* and the testimony of the Finns in returning the subject aircraft to Bakersfield in May of 1952 at the request of the School District's counsel [R. 474-475] and the finding of the jury in answer to Interrogatory No. 2 [R. 112] and Interrogatory No. 7 [R. 113] (see in this connection V. 12) is further indication of the meaning of the terms of the Agreement

between the District and the Finns. The actions of the Finns clearly shows that they too recognized the District's rights in the aircraft.

Reliance of International in its argument on the salvage clause of the subject Agreement (I. A. 53) would appear to be of no consequence, since the lower court has found the Finns never intended to do anything but put the aircraft into commercial flight use. However, even assuming the salvage clause applicable, it, too, is subject to the provision "that the contractors have fully performed *all* the conditions of this agreement." There is even serious question as to the validity of the clause itself, since no similar provision or exception was provided for in the "Notice for Bids."

International points out Vineland's omission to cite the direct constitutional provision relied upon in arguing that performance must first, or concurrently, be obtained by a school district (a condition precedent), or the district would be lending its credit to a private person. The pertinent part of said Article IV, Section 31 of the California Constitution provides as follows:

> "The Legislature shall have no power to give or to lend, or to authorize the giving, or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . ."

Veterans' Welfare Board v. Jordan, 189 Cal. 124, at 128, provides as follows:

> "So far as our research reveals, the decisions are unanimous upon the proposition that this provision of the constitution prohibiting the giving or loaning of credit should be construed liberally to effect its purpose. Such construction would, therefore, prohibit any plan or scheme by which in substance and effect the credit of the state is given or loaned, regardless of the particular form which the transaction takes."

International argues Vineland is not lending its credit —the Finns are lending their credit. This is erroneous if the present contract is construed by this Court as passing title to the Finns prior to payment therefor of the cash consideration or the performance of other considerations. The District, which is a political subdivision of the State of California, has thus lent its *credit* to the Finns. There has been "in substance and effect" a lending of the credit of the School District. The District has in effect borrowed the contract price, or value of the aircraft, from the taxpayer and loaned said amount to the Finns to be repaid by the Finns at a later date, and, which at the date of the trial, over three years later, had not yet been paid. Only if the contract is construed as reserving the title and use in the District, even if the District is not putting the aircraft to an educational use at the present time, can the present contract be construed as valid. To reach this conclusion, the contract must be construed as providing for a condition precedent to passage of said title and use, or at least a conditional sales contract passing only equitable title with a right of repossession at the will of the District upon default of the Finns.

That the Finns are, in fact, in default is clear in the record as is indicated in Vineland's Opening Brief (V. 12-13). Although an allegation of default and notice thereof may be necessary in a cross claim in the subject action between the District and the Finns, such would not appear necessary to the decision of the Court here as to the declaratory relief action between the Government and the District and in determining the nature of Vineland's interest and title in the aircraft. In other words, if a condition precedent or conditional sales contract exists, there has been no transfer of full title in the aircraft to the Finns, at best it is merely an *attempt* to do so. At most, this point of default would have to be determined as not having been placed before the Court and is undecided; and, therefore, any judgment, finding or conclusion granting, finding or concluding that right, title and interest to the subject aircraft belongs to anyone but the School District would be improper. Testimony of an agent of the District who is not a member of its board of trustees that "we never saw any evidence that they would not perform" their contract is not evidence that the Finns were not, in fact, in default. (International's Br. p. 55.) Nor does the matter of notice of default appear to be appropriate to show that conditions precedent to title passage have been performed, nor that *legal* as distinguished from equitable title has been transferred to anyone other than the District until *all* conditions have been performed. Also, clearly the *use* of the subject aircraft remains in the District, even assuming legal title passed until *all* conditions were performed.

International argues (I. A. 54-55) that no ambiguity appears in the subject Agreement [Vineland's Ex. "B"] for which parol evidence may be admitted, and that this was a matter for the trial court to decide and the trial

court did so by its finding as follows: "on February 28, 1951, (Vineland) did sell and did transfer constructive possession of said aircraft Defendant Charles C. Finn and Defendant George C. Finn [R. 150]."

International then points out that conflicting findings by the jury and adopted by the Court must be ignored, since a specific finding of the Court controls a general finding (I. A. 55).

First, this Appellant agrees that no ambiguity appears in the Agreement; to the contrary, it appears clear that said Agreement provides a condition precedent to passage of title, or at least a conditional sale, with legal title in the District. But assuming an ambiguity in that the Agreement, in the first part thereof, provides for immediate transfer of title, and later clauses indicate conditions "notwithstanding" such provisions, and also no indication of intent to pass title in the "Notice for Bids", then the intention of the parties becomes important. The jury and Court, in adopting their findings found in favor of the District. In this regard, see Answer to Jury Interrogatories No. 2 [R. 112] and No. 7 [R. 113]. Instead of determining, as International has, that the District Court has thus been inconsistent, surely the District Court's determination must be construed so as to indicate consistency therein. And consistent they are for the finding of the Court quoted above [R. 150] that the District "did sell" said aircraft to Finns is not determining the *nature* of such sale. In other words, the Court has left unanswered the question of whether said sale is subject to a condition precedent or of equitable title only. That the Court recognizes the possibilities of a defeasible sale is indicated when in the same finding the Court finds that only "constructive possession" was transferred. Also, the Court indicates that the nature of the sale is

apparently to be determined in later action between the District and the Finns, and consequently anyone claiming under the Finns, in that it found, concluded and determined, in general, that the Court's findings, conclusion and judgment shall be without prejudice to any other claims which Vineland or Bancroft may have against the Finns [R. 155, 158, 161]. This action by the Court was necessary since there was no cross claim in the action between the Finns and Vineland, none being compulsory or necessary in the action. The District Court, if it erred, did so to the extent that it made any finding, conclusion or judgment of right, title and interest in the subject aircraft, placing title or a right of possession thereof in anyone other than Vineland (see Vineland's Specification of Errors in V. 2-3).

II.

As Between International and Vineland, International is Not a Bona Fide Purchaser (Encumbrancer, Accessor).

International's argument concerning application of Section 25 of the Surplus Property Act does not concern Vineland (I. A. 58-59).

International argues, apart from said Act, that it is nonetheless a bona fide purchaser in that the Court found International to be in "good faith" in believing the Finns were the true and lawful owners of the aircraft. International then concludes that the Court, by this specific finding, has overruled the jury's general findings (adopted by the Court) and has thus found International to be a bona fide purchaser. This conclusion is clearly erroneous. Again, the rules of construction are not to be stretched to find an inconsistency, but to the contrary every effort must be made to find consistency in con-

struing the actions of the lower court. Good faith belief is only one element in the requirement of a bona fide purchaser; a separate and distinct element is that such person be without notice, either constructive or actual. Here the Court could well find that International in "good faith" believed, and yet adopt the finding of the jury, that International had either "notice or knowledge" of Vineland's interests and claims, which, of course, would destroy International's position as a bona fide purchaser. There is a duty on a purchaser to *investigate* interests and claims of others, not merely to blindly place their *faith* in those with whom they are dealing.

III.

Vineland School District Is Not Estopped to Deny That It Passed Title to the Subject Aircraft to the Finns.

Contrary to the position taken by International in its answering brief (I. A. 67-71), Vineland is not estopped to deny that it passed title to the Finns either under estoppel by deed or estoppel *in pais*.

International in its argument for estoppel by deed sets forth statements in a "Bill of Sale" given by Bancroft (I. A. 67-68) and in Vineland's agreement [Vineland, Ex. B] (I. A. 68-69) indicating that the district had acted in such a way so that it is now estopped. Nowhere does International show where it *relied* on either document to its detriment. Clearly such reliance is essential to a finding of estoppel. To the contrary the evidence is clear that International relied upon a C. A. A. registration [R. 620, 633] and also apparently on a letter from an aircraft title company [R. 626-628, 633; International's Ex. L]. This International relied upon even though it knew the plane was a war surplus aircraft and

was purchased by the Finns from Vineland School [R. 620-621], and also even though the C. A. A. record [Pltf. Ex. 7] provided therein on page 2 that the sale of the aircraft from Vineland to Finns was "contingent upon the agreement in writing executed between the Vineland School District and Charles C. Finn and George C. Finn, dated February 28, 1951" [R. 637]. International also had a personal friend check this C. A. A. file for the title flaws and encumbrances [R. 635-636]. The Court and jury of course found International had both notice and knowledge of Vineland's interest and claims to the aircraft [Answer to Interrogatories #10 and #11, R. 114].

Even assuming that the facts indicate that the elements of the doctrine of estoppel has been complied with, International cites no cases where the doctrine of estoppel by deed has been applied against a governmental agency.

The doctrine of estoppel whether by deed or *in pais* has been sparingly applied and then only in extreme hardship cases. Although the doctrine of estoppel has been applied against a public agency in the past where such agency is one which has authority to act and has acted in a *proprietary* capacity it has only been in recent years that any estoppel has been applied against a public agency acting in its *governmental* capacity. International cites paragraphs from cases which indicate the ruling as to public agencies acting in their *proprietary* capacity which are clearly inapplicable here (*People v. Gustafson,* 53 Cal. App. 2d 230; *Brown v. Town of Sebastopol,* 153 Cal. 704).

A school district is one of the most restricted public agencies known to the law. (*Pasadena School District v. City of Pasadena,* 166 Cal. 7; *Denman v. Webster,* 139 Cal. 452; *TheMacMillan Co. v. Clarke,* 184 Cal. 491; *Skelly v. School District,* 103 Cal. 652, 659; *People v. Rinner,* 52 Cal. App. 747.) Nowhere in the statutes governing school districts is there any authority to act in a proprietary capacity. Unlike a municipality it is not in

the nature of a school district to enter into a business capacity.

The only case which International cites where estoppel has been applied in California to a public agency where a public officer and said agency were acting in a governmental capacity is *Farrell v. County of Placer,* 23 Cal. 2d 624. This case, however, is to be strictly construed to its facts since it is a departure from the general rule. Said case was one where extreme hardship was involved and was an application of estoppel to set aside a harsh procedure rule of 90 days limitation of time to file a claim against a county and where a county agent had *directly* misled the plaintiff. No such harsh facts appear in the present case. International alleges no such facts of reliance on the districts actions and as pointed out above none in fact appear.

To the extent, if any, that this Court finds the agreement [Vineland's Ex. B] is one wholly beyond the scope of the power of the school district, there can be no estoppel against the school district to its raising the defense of the illegality of the contract. To permit an estoppel in such a situation would be to defeat a strong public policy and result in indirect enforcement of illegal contracts. The general rule has been stated by the Courts of this State on numerous occasions that contracts beyond the statutory power of the political subdivision, such as a school district, are void, and the mode of contracting as prescribed by statute is the measure of the power of that political subdivision to contract, and a contract made in disregard of the prescribed mode is void and unenforceable. (*Miller v. McKinnon,* 20 Cal. 2d 83, 88; *Inyokern Sanitation District v. Haddock-Engineers Ltd.,* 36 Cal. 2d 450, 454; *County of San Diego v. California Water and Telephone Company,* 30 Cal. 2d 817, 825; *Bear River Sand and Gravel Corp. v. County of Placer,* 118 Cal. App. 2d 684, 689; *Estate of McMillin,* 133 A. C. A. 713, 731; *Stockton Morris Plan Company v. California Tractor and Equipment Corp.,* 112 Cal. App.

2d 684, 689; *Farrell v. Placer County,* 23 Cal. 2d 624, 631; *Charles L. Harney Inc. v. Frank B. Durkee,* 107 Cal. App. 2d 570, 578; *Los Angeles Dredging Co. v. Long Beach,* 210 Cal. 348; *Reams v. Cooley,* 171 Cal. 150; *Zottman v. San Francisco,* 20 Cal. 96.) To permit an estoppel to be raised in such situation would be to deny the invalidity of such a contract and would operate to defeat the public policy which the statutory measure of power it was designed to protect. This rule is well stated in the case of *County of San Diego v. California Water and Telephone Company,* 30 Cal. 2d 817, at page 826, where it is stated as follows:

> "It is clear, . . ., that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. (See *Miller v. McKinnon,* 20 Cal. 2d 83 (124 P. 2d 34, 140 A. L. R. 570), and cases cited therein; *Pan Amer. Co. v. United States,* 273 U. S. 456, 505-506 (47 S. Ct. 416, 71 L. Ed. 734); *American Surety Co. of N. Y. v. United States* (C. C. A. 10th), 112 F. 2d 903, 906.) In the American Surety Company case the court stated that the government could not be estopped so as to 'frustrate the purpose of its laws or thwart its public policy.' (112 F. 2d, at p. 906.) In 3 McQuillin, Municipal Corporations (2d ed., 1943), section 1266, it is said that various statutory procedures or steps exist to protect citizens and taxpayers from ill-considered contracts or those showing favoritism and that if recovery is allowed for property or services on the ground of estoppel or implied contract, 'then it follows as the night the day that the statute or charter provision can always be evaded and set at naught.' The author adds that the rule denying indirect enforcement of such void contracts harmonizes with our governmental system, appears to be supported by reason, and is not unjust, because the other party is charged with notice of the law. (See, also, *Miller v. McKinnon,* 20 Cal. 2d 83, 88-89 (124 P. 2d 34, 140 A. L. R. 570).)"

The rule prohibiting an estoppel where the contract is illegal is so strong that the Supreme Court of the State of California has refused to enforce illegal contracts regardless of whether or not the matter has been advanced in the lower court. (*Fewel & Dawes Inc. v. Pratt*, 17 Cal. 2d 85, 91-92; *Morey v. Paladini,* 187 Cal. 727; *Stockton Morris Plan Company v. California Tractor and Equipment Corp.,* 112 Cal. App. 2d 684, 690.)

Even where the governmental body has received benefits as the result of the illegal contract the illegality may nevertheless be shown and no estoppel can be raised. As was stated in *County of San Diego v. California Water and Telephone Company,* 30 Cal. 2d 817, 830:

> "All of the California cases hold, however, that receipt of benefits by the governmental body is insufficient to raise an estoppel where, as here, the transaction is unauthorized by law and contrary to public policy."

(Citing *Miller v. McKinnon, supra; Mullin v. State,* 114 Cal. 578; *Miller v. City of Martinez,* 28 Cal. App. 2d 364; *County of Shasta v. Moody,* 90 Cal. App. 519, and cases from other jurisdictions.)

IV.

International Airports Has Not Acquired Prior Rights by Accession.

Vineland recognizes that rights and property may be acquired by accession as is pointed out by International in its Answering Brief (p. 77); however, it is submitted that under the facts applicable to the present case no title was acquired by International by accession.

It should be noted that it was found by the trial court in the Special Verdict, Interrogatory No. 11 [R. 111] that International Airports Inc. *had either knowledge or notice* of the existence of interests and claims of defendant Vineland School District to the aircraft in suit under the Agreement between Vineland and defendants Finn at the time International performed labor and furnished

materials of the value of $10,200 for the repair and improvement of the aircraft. In view of the fact that International knew of Vineland's interest in the plane at the time such repairs were made, it follows that International acted as a wilfull trespasser in performing such repairs and adding materials to the subject aircraft. Under California Civil Code, Section 1031, Sections 1025 through 1030, inclusive, are inapplicable when a person wilfully uses the materials of another without his consent. In such cases the product of the work and addition of materials belongs to the owner of the material if its identity can be traced. In the present case International added materials and workmanship to the aircraft in suit without the consent of Vineland School District but with knowledge that said school district claimed an interest in the aircraft. Accordingly International, as a wilfull trespasser or conscious wrong-doer, did not acquire title to the aircraft even though the improved aircraft was of greater value than when the repairs were commenced. As is pointed out in 1 American Jurisprudence 204, a conscious wrong-doer or a "trespasser who wilfully takes the property of another can acquire no right or title to it on the principle of accession, but the owner may reclaim it whatever alteration of form or species it may have undergone if he can prove that it was made out of his property regardless of whether he can identify the original materials in the new article." In other words, the test as to whether title can be acquired by accession is whether the party had knowledge that he was violating the rights of another and deliberately disregarded such rights. (1 Am. Jur. 203.)

Even if it should be assumed that the additions to the aircraft were made with the knowledge and consent of Vineland School District (the facts clearly show International never checked with Vineland), International Airports Inc. still had knowledge that Vineland claimed an interest in the aircraft. Consequently the additions to the aircraft in question should be treated as no more

than ordinary repairs which merge in the principal thing with the result that the aircraft, together with the additional materials, belongs to the owner of the original article, that is, Vineland School District. It is submitted that the provisions in the California Civil Code (Secs. 1025-1033) were not intended to change the common law rule that ordinary repairs made with the consent of the owner do not result in a transfer of title to the person making such repairs. (See 1 Am. Jur. 200, Sec. 6.)

If it should be determined that a transfer of title by accession did occur, it becomes important to determine the value of the aircraft both prior and subsequent to such repairs. The trial court in its Special Verdict [R. 116-117] found that the value of the subject aircraft on various dates was as follows:

February 28, 1951	$20,000
April 14, 1951	$25,000
October 26, 1951	$25,000
July 3, 1952	$50,000

It was further found by the trial court in its Findings of Fact [R. 152] that the repairs and improvements which were made by International upon the subject aircraft were made between October 26, 1951 and May 25, 1952, and that the reasonable value of such labor and materials was $10,200. From the foregoing figures it appears that at the time International commenced said repairs and improvements the subject aircraft had a value of $25,000 and that the value of the improvements was an additional $10,200 or a total of $35,200. No finding was made as to the reasonable value of the aircraft on May 25, 1952, at which time International had completed its repairs and improvements of the subject aircraft. It can only reasonably be assumed that the difference in value of the aircraft after such repairs and improvements were made, which was $35,200, as compared with the value on July 3, 1952 of $50,000, was due to the then current rise in the market for such type of aircraft. It appears then from the foregoing that the value of the repairs and

improvements made by International at best consisted of $10,200 of an aircraft valued at $35,200, or less than one-third of the total value of the plane. Clearly then the owner of the principal part of the improved plane was Vineland and not International Airports Inc. It is provided in California Civil Code, Section 1025, that "when things belonging to different owners have been united so as to form a single thing and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner or surrender the whole to him." Assuming that it should be held that the rule of accession applies to the instant case, the school district would have discretion under the provisions of Section 1025 to reimburse International for the value of the repairs and improvements which were made or to surrender the whole aircraft to International.

It is submitted, however, that International is not entitled to the benefits of the doctrine of accession for the reason that all of the subject repairs and improvements were made by International with full knowledge of the interests which Vineland School District claimed in the subject aircraft and that such repairs and improvements were merely ordinary repairs which inure to the benefit of Vineland School District.

Conclusion.

It is submitted that the judgment should be reversed as to those matters set forth in Appellant Vineland's Opening Brief under Specification of Errors (V. 2-3) and affirmed as to all other matters.

Respectfully submitted,

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